INDEX

Cases Cited

	Page
ı v. *United States*, 3 F. (2d) 992	3
Aitolayo v. *United States*, 32 F. (2d) 472	3
De Ne Hung v. *United States*, 111 F. (2d) 325	2
Louells v. *United States*, 287 U. S. 435	4
Sorrler v. *United States*, 72 F. (2d) 589	2
Straed States v. *Abdallah*, 149 F. (2d) 219	3, 4
United States v. *Lindenfeld*, 142 F. (2d) 829	4
Unit v. *United States*, 54 F. (2d) 993	2
Wal	

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 237

LEOPOLD WILLIAM BRANDENBERG,
Petitioner,

vs.

THE UNITED STATES OF AMERICA

REPLY TO OPPOSITION BRIEF ON PETITION FOR CERTIORARI

The brief in opposition to the petition for writ of certiorari does not discuss the points raised and relied upon by petitioner. The opposition brief on the subject of entrapment discusses certain evidence relied on by the United States for the purpose of showing that the government agents were warranted in inducing defendant to give prescriptions for morphine; and on the merits of the case that no examinations of the persons to whom prescriptions were given were made; that the prescriptions were not given in good faith to relieve pain for disease but to satisfy the cravings of narcotic addicts. The opposition brief does not touch on the questions presented as reasons for the granting of the writ, but goes into the merits of the case to show that no error was committed by the Court below. While it is the position of the petitioner on the merits, the

Court below was in error, the merits are not involved in a petition for certiorari.

While petitioner desires to correct the record as to the factual basis of the opposition brief, it is respectfully submitted that the opposition brief does not answer the petitioner's brief or the petition for the writ in the following respects:

1. The opposition brief sets forth nothing to indicate that this case does not present a novel issue in so far as this Court's decisions are concerned on the question here involved, that is, that in cases of entrapment where a separate and independent act is required to be done to make a criminal offense and that act is done entirely by government agents, the defendant is not guilty. To be more precise, the Narcotic Law does not prohibit issuing of prescriptions or narcotics. The mere writing of a prescription with intent that the person to whom issued will obtain the drug is not a violation of the law. Acquisition of the drug is required to constitute the completed offense. See *Strader* v. *U. S.*, 72 Fed. 2 (589), an authority cited.

This Court has not decided a case where the defendant issued a prescription to a person in government employ and where one act necessary to complete the offense of violating the Narcotic Law was done entirely by the government agent. This case is clearly distinguishable from that line of cases such as *Louie Hung* v. *U. S.*, 111 Fed. 2 (325) and *Wall* v. *U. S.*, 65 Fed. 2 (993), which hold that a government agent may purchase a narcotic drug from a *vendor* and thus be the basis of conviction of the vendor. In such a case the offense is complete on the unlawful sale. The vendor makes the sale and thus violates the law. In this case, however, the offense was not complete until the prescription was filled, a separate and distinct act. In this case the defendant in any event, would not have been

guilty except for the separate, sole and legally necessary act of the government agent acting alone who had it entirely in his hands as to whether the defendant would be guilty or not. The separate and distinct act which makes the crime complete was in the hands of the government agent and was performed by him. See *De Mayo* v. *U. S.*, 32 Fed. 2 (472) and *Strader, Supra.* There is no decision of this Court on the question as to whether a physician issuing a prescription for narcotics is guilty of violating the Narcotic Act where the prescriptions were filled by government agents, that is, where the crucial act necessary for making the crime is done *entirely* by the government agent who "afforded" the accused physician the "opportunity" to commit the crime. The opposition brief does not answer this point.

2. The opposition brief does not answer the question presented in petitioner's brief as to the conflict of decisions of the Circuit Courts of Appeals except by the categorical statement that there was no conflict. Attention is invited to the case of *Strader* v. *U. S., Supra,* where that Court stated as follows:

> "The mere writing of a prescription with the intent and purpose that the person to whom it is given will obtain a drug is not a violation of the statute. Acquisition of the opiate is required to constitute the completed offense." Also see the case of Aiton *v.* U. S., 3 Fed. 2 (992) to the same effect.

The Circuit Courts of Appeals, sought to be reviewed here (attached to record), upheld the conviction of petitioner notwithstanding the undisputed fact that prescriptions involved were issued to persons in government employ and were filled entirely by such government agents without any assistance or cooperation of the physician, petitioner. The Circuit Courts of Appeals relied on the cases of *U. S.* v.

Abdallah, 149 Fed. 2 (219) and *U. S.* v. *Lindenfeld*, 142 Fed. 2 (829) as authority. To the extent that they might be considered authority they are directly contrary to the *Strader* and *Aiton* cases, *Supra*.

In neither of these cases, however, does it clearly appear that the decoys or detectives who obtained the prescriptions and had them filled were in the employ of the United States nor does it clearly appear in either case that they were filled by government agents acting entirely alone without any cooperation from the physician who issued the prescriptions.

In the *Abdallah* case, the Court states that the crucial act was committed when the prescription was issued. The Court upheld conviction although the Court specifically reserved the question raised here as to the offense being completed and made a crime by the act of filling the prescription by a government agent. The Court said "we need not stop to consider how far this principal may be soundly pressed." In the case now sought to be reviewed, this precise question is now being presented to this Court. The Court in the *Abdallah* case recognized the fact that the principal here sought to be decided had never been "soundly pressed." The statement of the Court in the *Strader* case and other decisions referred to to the effect that the filling of prescriptions was necessary to make a crime complete as to the violation of the Narcotic Act is directly opposite to the decision of the *Abdallah* case to the effect that the filling of the prescriptions was a crucial fact. The categorical statement in the opposition brief that there is no conflict is thus refuted.

3. The case sought to be reviewed is also in conflict with the *Sorrell's* case decided by this Court (287 U. S. 435) which held on the question of entrapment that government agents could legally afford an opportunity only for the

commission of a crime. Clearly when a government agent goes beyond that point the act is beyond the scope of the recognized legal acts that a government agent can perform under the *Sorrells* case. In a case where an agent actually himself alone performs an essential separate act which makes the crime complete this constitutes more than merely affording a person with a previous intent an opportunity to commit the crime.

4. The opposition brief states that the trial court accurately and correctly instructed the jury on the question of entrapment and the distinction between luring a person into committing a crime where he otherwise would not have committed it and had no intention of committing an offense and merely affording an opportunity to a person whom he had reason to believe already had the criminal intent and design to commit an offense, to do so. Where, however, the facts are not in dispute that the government agents alone obtained the prescriptions and alone performed the final and crucial act making a crime without any act on the part of the defendant, the Court should have ruled as a matter of law on the question of entrapment that no offense had been committed by petitioner, in accordance with the decision in the *Strader* case, *Supra,* and other Circuit Courts of Appeals decisions referred to. The facts on this point not being in dispute, it was not a jury question.

5. On the factual situation to which the opposition brief is confined, petitioner in reply respectfully submits: On the question of whether there was an examination of Humphries and Van Pelt before petitioner prescribed for them the opposition brief states that both of these witnesses testified that no examination was made. The Court accepted this testimony and the jury relied on it. It is clear, however, that each of the said witnesses gave a history of their alleged ailment setting forth their symptoms to the physi-

cian. According to the government witnesses, Dr. Markel and Dr. O'Conner, the history of a case and symptoms of a patient constitute an important part of an examination. Whether such history of the patients' cases is an examination according to medical standards is a matter beyond the knowledge of laymen. In view of the fact that the witnesses themselves testified that they gave a history of their cases and symptoms (see record pages 53a, 56a, 134a to 137a) their testimony that no examination was made of them constitutes merely their conclusion and is not competent testimony. Their testimony should have been striken from the record. There is no dispute that the history and symptoms of each patient was given to the petitioner in this case. That history, according to medical authority, introduced by the government and a part of the record is important and highly desirable in the examination of a patient. See testimony of Dr. Markel (pages 182a, 183a).

The testimony of Humphries and Van Pelt goes to the heart of the issue on the merits of this case in view of the fact that the statute permits a doctor to prescribe or supply drugs for patient in the course of his professional practice. The trial court, therefore, was in error in permitting the testimony of laymen witnesses that no examination was made in view of the record of this case. The trial court also erred in not charging the jury that the taking of the history and symptoms of a patient was a part of an examination by a doctor in accordance with the undisputed evidence of the medical authorities in evidence.

The opposition brief (page 14) states that if "petitioner had purported to examine Humphries and Van Pelt or had gone through a form or semblance of an examination, there might be some substance to the argument that they, as laymen, would have been unqualified to express opinions as to the adequacy of the examinations made from a medical view point." The opposition brief states further that "both

Humphries and Van Pelt testified that petitioner at no time gave them any examination whatever." In view of the testimony nithe record of medical authority to the *affect* that the taking of the history and symptoms of a patient is an important, if not essential, part of an examination it is respectfully submitted that not only were the witnesses, Humphries and Van Pelt, in error as to their statement that no examination was made, but they were wholly unqualified to testify on the subject.

Respectfully submitted,

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Dated this 27th day of Sept., 1947.